No. 840

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Washington, Northern Division.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

INDEX.

In the Superior Court of the State of Washington, for the County of King.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY, and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. —.

Complaint.

Comes now the plaintiff, G. W. Roberts, and for cause of action against the defendants Pacific & Arctic Railway and Navigation Company and British Columbia Yukon Railway Company, and each of them, alleges:

I.

That now and at all the times hereinafter mentioned the defendant Pacific & Arctic Railway and Navigation Company is and was a corporation organized under the laws of the State of West Virginia, and that now and at all the times hereinafter mentioned, the defendant British Columbia Yukon Railway Company is and was a corporation organized under the laws of the ——— of ———.

II.

That on the 16th day of December, 1898, said defendants were doing business in the Territory of Alaska and

the State of Washington, having offices and places of business in both the town of Skagway, Alaska, and the city of Seattle, Washington, and were at said times, and at all times since, have been conducting and carrying on their corporate business at both of the above-named places.

III.

That both of the defendant corporations were organized for the purpose, among others, of constructing, building, and operating a railroad from Skagway to the summit of White Pass, Alaska, and from thence to Lake Bennett in said Alaska, and when constructed to do a general business as a common carrier in the transportation of both freight and passengers over its said railroad from Skagway to said Summit, and from thence to said Lake Bennett.

IV.

That prior to the 16th day of December, 1898, the defendant corporations had commenced the construction of the railroad as aforesaid from said Skagway to the summit of White Pass, and from thence as aforesaid to Lake Bennett, and on said 16th day of December, 1898, the said railroad was under construction as aforesaid, and was on said last-named date largely completed from said town of Skagway to said summit of White Pass; that the prime object of the defendants in the construction of said railroad, was to transport thereover both passengers and freight bound and en route from said Skagway to Dawson City in the Northwest Territory, Dominion of Canada, and other points on the Yukon River in

Alaska, and said Northwest Territory, and the gold fields contiguous and near thereto, situate in said Territory of Alaska and the Northwest Territory, Dominion of Canada; and that said freight and passengers it was on said 16th day of December, 1898, intended to be transported over the said railroad by the defendants from Skagway to the summit of White Pass; and to enable said passengers and freight to reach and be transported to the gold fields and destination as aforesaid, that they be hauled and transported by wagons and sleds to be drawn by livestock from said summit of White Pass to Lake Bennett.

V.

That the defendants and plaintiff, fully understanding that such freight and passengers of necessity must be transported by sleds and wagons from the summit of White Pass to Lake Bennett as aforesaid, and as an inducement to passengers and owners of freight to be transported and go over the railroad then being constructed as aforesaid by the defendant companies, that proper and suitable provisions should be made and provided for transporting such freight and passengers from the summit of White Pass to Lake Bennett as aforesaid, and that it was of vital importance to defendants in the operation of said railroad when built, as an inducement to have passengers and owners of freight ship over the said railroad, that such provisions be made and facilities provided for the carrying of such freight and passengers from the temporary terminus of said railroad at the summit of White Pass to Lake Bennett, and said defendant

corporations fully realizing the importance of providing proper and suitable facilities for carrying such freight and passengers between White Pass and Lake Bennett, and desiring that proper and suitable facilities should be made and provided for such transportation, did, on the 16th day of December, 1898, at Seattle, Washington, make a proposition to plaintiff in writing, stating that they expected to haul from Skagway to the summit of White Pass about 4,000 tons of freight between January 15th and April 15th, 1899, and that they accepted the rate given theretofore by plaintiff to them of 4½ cents per pound from the summit of White Pass (International Boundary) to Lake Bennett; and further proposed to plaintiff to divide the freight with him and other parties in proportion to their carrying capacity, and further agreeing to allow plaintiff's sleds, harness and horses to be repaired at their blacksmith-shops along the trail, and asking for an acceptance of said proposition from the plaintiff.

VI.

That prior to the making by defendants to plaintiff of said proposition, a conversation was had between plaintiff and the agent and general traffic manager of defendant corporations covering the matters heretofore alleged, and during said conversation and as one of the important features covered thereby, plaintiff stated to said agent and general traffic manager, that he did not own at that time, horses, harness, sleds, etc., to do the freight business as aforesaid from the summit of White Pass to Lake Bennett, but that he (plaintiff) would pro-

vide himself with horses, harness, sleds, etc., to do freight business and haul freight from the summit of White Pass to Lake Bennett which was to be transported as aforesaid over the railroad from Skagway to the summit of White Pass; but that he would not so provide himself with horses, sleds, etc., unless the defendant corporations agreed to and would in good faith, furnish him with the freight so to be carried from the summit of White Pass to Lake Bennett, and that should he (plaintiff), provide himself with the proper facilities for carrying said freight as aforesaid, that he should expect and did expect, and defendants agreed with plaintiff that they (defendants) would, in good faith, furnish and provide him with freight as provided in said written proposal.

VII.

That said written proposition of defendants was received by plaintiff on the 16th day of December, 1898, and was by plaintiff on December 17th, 1898, at Seattle, Washington, in writing accepted by the plaintiff, and plaintiff agreed to provide himself with the proper facilities for doing said freight business as aforesaid.

VIII.

That after the 17th day of December, 1898, and relying upon the promise and agreement made by plaintiff with defendants as aforesaid, plaintiff purchased and procured twenty head of horses and harness for each thereof and the necessary sleds, tools, implements, appliances, etc., at a total cost to him of $7,000.00 and took the same to said summit of White Pass or near thereto to be

in readiness and to enable him to transport freight as aforesaid pursuant to the terms and provisions of said contract and agreement, all of which facts were at that time fully known to defendants.

IX.

That at the time of the making of the said contract, it was the expectation of both the plaintiff and the defendants that said railroad would be completed and ready for operation from Skagway to said summit by the 15th day of January, 1899; and plaintiff procured said horses, sleds, appliances, etc., and had same in readiness to do said freighting business as early as the 10th day of January, 1899, but plaintiff alleges that said railroad was not completed or ready for operation until the 17th day of February, 1899, and freight was not transported thereover from Skagway or any other point, to the summit, earlier than said last-named date; and plaintiff alleges that he was ready, willing and able, at the time of the completion as aforesaid of the railroad to the summit, and thereafter, and at all times between the 15th day of January, and the 15th day of April, 1899, to carry and transport such freight from the summit to Lake Bennett, upon the terms and as provided in said agreement; but plaintiff alleges that notwithstanding all the facts hereinbefore set forth and contained, defendants and each of them, intentionally and willfully broke and violated their said agreement with plaintiff, and did not, in good faith, carry out or undertake to carry out their said agreement, but on the contrary, willfully diverted from plaintiff, to other par-

ties, all of the freight seeking transportation and transported between said summit and Lake Bennett as aforesaid.

X.

Plaintiff further alleges that between the 17th day of February, 1899, and the 15th day of April, 1899, said railroad transported over its said line from Skagway to said summit, large and immense quantities of freight, to wit, 200 tons per day, and that had it furnished plaintiff with such freight which had to be carried from the summit to Lake Bennett, in proportion to his carrying capacity as compared with other parties, plaintiff could have and would have earned a gross amount of $220.00 per day for each team of two horses in the transportation and carrying of the same under the terms provided by the said contract; but plaintiff alleges as aforesaid, that notwithstanding it was in the power and control of the defendant companies to have so provided and furnished him with freight as aforesaid, said defendants discriminated against the plaintiff and diverted willfully and maliciously to other parties the whole of the said freight; and plaintiff alleges that during the whole of the time covered by the said contract, he was unable to utilize the said horses, sleds, etc., in any other business sufficient to pay the expenses of working said horses, sleds, etc., and shortly thereafter sold the same at a large sacrifice to plaintiff; that by reason of the facts hereinbefore recited and alleged, plaintiff suffered damages in the sum of $50,000.

Wherefore, plaintiff asks for damages against the

defendants and each of them, for the sum of $50,000, and for all costs and disbursements herein incurred.

BALLINGER, RONALD & BATTLE, and
J. D. JONES,

Attorneys for Plaintiff.

State of Washington, } ss.
County of King. }

G. W. Roberts, being first duly sworn, on oath says: that he is the plaintiff in the above-entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and believes the same to be true.

G. W. ROBERTS.

Subscribed and sworn to before me this 8th day of May, 1900.

A. J. TENNANT,
Notary Public in and for the State of Washington, Residing at Seattle.

Filed August 18, 1900. Geo. M. Holloway, Clerk.

Filed in the United States Circuit Court, District of Washington, September 26, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Superior Court of the State of Washington, for King County.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. ——

Petition for Removal on the Ground of Diverse Citizenship.

The petition of the Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company shows to the Court:

That the above suit was begun against them in the Superior Court of the State of Washington for King County on or about the 6th day of August, 1900.

That at the time said suit was begun and at the present time the plaintiff was and is a citizen and resident of the State of Washington, and the defendant, Pacific & Arctic Railway and Navigation Company, was and is a corporation duly formed and existing under and by virtue of the laws of West Virginia with its principal place of business at the city of Chicago, in the State of Illinois, the place where said corporation is domiciled, and the said defendant, British Columbia-Yukon Railway Company, was and is a corporation duly formed and exist-

In the Superior Court of the State of Washington, for the County of King.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

Bond on Removal.

Know all men by these presents, that we, the Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company, as principals, and N. H. Latimer and E. B. Hussey, as sureties, are jointly and severally held and firmly bound unto G. W. Roberts in the penal sum of three hundred dollars ($300.00), for which amount, well and truly to be paid unto the said G. W. Roberts, his heirs, executors and administrators and assigns, we bind ourselves, our heirs, executors, administrators, successors and assigns, firmly by these presents. Sealed with our seals and executed this 20th day of August, 1900.

The condition of this obligation is such that if the said Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company, in a suit now pending in the Superior Court of the State of Washington for the County of King, shall on the first day of the next session of the term of the Circuit Court of the United States for the District of Washington, Northern Division, enter a copy of the record on said suit and shall enter the appearance of the said Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company in said Circuit Court of the United States, and shall pay all costs that may be awarded against them by the said Circuit Court if said Court shall hold that said suit was wrongfully or improperly removed from said Superior Court, then this obligation to be void, but otherwise to remain in full force and effect.

In witness whereof, the said obligors have hereunto set their hands and seals this 20th day of August, 1900.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION CO., and
BRITISH COLUMBIA-YUKON RAILWAY CO.,

By JOHN P. HARTMAN,
Their Attorney.

N. H. LATIMER.
E. B. HUSSEY.

State of Washington, }
County of King. } ss.

On this 20th day of August, A. D. 1900, before me, personally came N. H. Latimer and E. B. Hussey, to me personally known and known to be the persons who executed the foregoing bond, and acknowledged that they executed the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal this 25th day of August, 1900.

[Notarial Seal] JOHN P. HARTMAN,
Notary Public in and for the State of Washington, Residing at Seattle.

We hereby acknowledge service of the foregoing and receipt of a true copy thereof this 24th day of August, 1900.

BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.

Filed September 4, 1900. Geo. M. Holloway, Clerk.

Filed in the United States Circuit Court, District of Washington. September 26, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Superior Court of the State of Washington, for King County.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. 29,457.

Objection to Defendants' Petition to Remove.

Comes now the plaintiff in this action and objects to the granting of the petition of defendants filed herein, asking that this cause be removed to the Federal Court for the District of Washington, Northern Division, for the reason and upon the ground that said Circuit Court of the United States for the District of Washington is without jurisdiction to hear and determine this cause.

BALLINGER, RONALD & BATTLE,
J. D. JONES,
Attorney for Plaintiff.

Copy of within —— received and due service thereof acknowledged this 6th day of September, 1900.

JOHN P. HARTMAN,
Attorneys for Defendant.

Filed September 7, 1900. Geo. M. Holloway, Clerk.

Filed in the United States Circuit Court, District of Washington. September 26, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Superior Court of the State of Washington, in and for the County of King.

G. W. ROBERTS,
Plaintiff,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.
No. 29,457.

Order of Removal from State Court.

This cause coming on to be heard upon the 8th day of September, 1900, upon the petition of defendants for removal of this cause to the United States Circuit Court for the District of Washington, Northern Division, and upon the objections of the plaintiff thereto to the removal of said cause, the said plaintiff being represented by his attorneys, Alfred Battle and J. D. Jones, and the said defendants being represented by their attorney, John P. Hartman, and after listening to the argument of counsel, and being fully advised in the premises, the cause was continued to this 10th day of September, 1900, and upon this day after due consideration, it is ordered—

1. That the bond and security offered by the said de-

fendants upon the removal of said cause be accepted, and said bond be and hereby is approved.

2. That this Court proceed no further in this cause.

3. That this cause be removed into the United States Circuit Court for the District of Washington, Northern Division, and the clerk is hereby directed to make proper transcript, and upon payment of his fees to transmit the same to the clerk of the United States Circuit Court for the District of Washington, Northern Division, at Seattle, Washington.

4. That the defendants be and hereby are permitted to amend their petition for removal, by inserting the words "was and," preceding the word "is," in the 9th line from the bottom of page one.

To the granting of said amendment, plaintiff objects.

To the granting of this order, plaintiff objects.

Done in open court this 10th day of September, 1900.

O. JACOBS,

Judge.

Filed September 10, 1900. Geo. M. Holloway, Clerk.

Filed in the United States Circuit Court, District of Washington. September 26, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

Motion to Remand.

Comes now the plaintiff and moves this Court to remand the above-entitled cause to the Superior Court in and for King County, in the State of Washington, on the ground that this Court is without jurisdiction to hear and determine the case.

J. D. JONES and
BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.

Copy of within motion to remand received, and due service thereof acknowledged this 25th day of September, 1900.

JOHN P. HARTMAN,
Attorney for Defendants.

[Endorsed]: Motion to Remand. Filed in the United States Circuit Court, District of Washington. September 26, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
vs.
PACFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

Opinion.

(Filed November 1, 1900.)

Action at law by a citizen of the State of Washington against two defendants, one being a corporation of the State of West Virginia, and the other an alien corporation. Heard on motion to remand. Motion denied.

BALLINGER, RONALD & BATTLE, for Plaintiff.
JOHN P. HARTMAN for Defendants.

HANFORD, District Judge.—The plaintiff has moved to remand this case to the State court, in which it was commenced, relying upon some of the newest text-books as authorities for so construing the act of Congress defining the jurisdiction of United States Circuit Courts (1 Supp. U. S. R. S., 2d ed., p. 611), as to exclude this case, for the reason that a citizen and an alien are joined as codefendants. It is asserted that the statute does not

confer upon United States Circuit Courts jurisdiction on the ground of diverse citizenship of the parties, where the controversy is between a citizen of a State on one side, and a citizen of a different State and an alien on the opposite side. (Black's Dillon on Removal of Causes, secs. 34, 68; L. Desty's Fed. Pro., 9th ed., p. 472; 18 Enc. Pl. & Pr., p. 238.) The only decisions of the Federal courts cited in support of the supposed rule are the following: King vs. Cornell, 106 U. S. 395-399; Merchants' Cotton Press Co. vs. N. A. Ins. Co., 151 U. S. 368-389; Field vs: Lamb, Fed. Cas. 4775; Ex parte Girard, Fed. Cas. 5457; Hervey vs. Illinois Midland Ry. Co., Fed. Cas. 6434; Sawyer vs. Switzerland Mar. Ins. Co., Fed. Cas. 12,408; Ward vs. Arredondo, Fed. Cas. 17,148; Dannmeyer vs. Coleman, 11 Fed. Rep. 97; Tracy vs. Morel, 88 Fed. Rep. 801.

In the case of King vs. Cornell, the Supreme Court decided that a suit by a citizen of New York, against several defendants, one of whom was an alien and the others citizens of the State of New York, was not removable, on the separate petition of the alien, and that the particular statute under which the right of removal was claimed in that case, had been repealed. Nothing else was decided and, in the opinion by Chief Justice Waite, there is not even a faint hint or suggestion of the idea that the mere joinder of nonresident citizens with aliens as defendants has the effect to deprive all the defendants of the right of removal, which they would have if sued separately. The other Supreme Court decision referred to is also entirely innocent of giving any aid or support to this fallacy. In Tracy vs. Morel, Judge Mun-

ger quoted with approval section 34 of Black's Dillon on Removal of Causes, and then repeats the author's error by saying that the same rule which he quoted from that text-book is stated in the case of King vs. Cornell. This opinion by Judge Munger comes nearer than any of the others in the above list to being an authority in point, but I do not consider it an authority, for the reason that the facts in the case did not warrant a decision of the question. The Court did not have jurisdiction of the case because the record failed to show that each of the defendants was entitled to litigate in the national forum, and it did show affirmatively that one of the defendants was a citizen of Nebraska, that being the State of which the plaintiff was a citizen and in which the suit was brought. For similar reasons, in each of the other cases cited, the Court did not have jurisdiction, and was not called upon to decide this question.

In the argument it has not been claimed that there is any reason for a rule denying to several defendants, when they are sued jointly, a privilege which the law gives to each of them, except that the case does not come within the letter of the law. It is said that:

"When a plaintiff, citizen of the State where the suit is brought, sues two defendants, one of whom is a citizen of another State, and the other an alien, * * * * the cause is not removable, because it does not come within any of the provisions of the statute. It is casus omissus. It cannot be said to be a controversy 'between citizens of different States,' because one of the parties is not a citizen; and it cannot be described as a controversy 'be-

tween citizens of a State and foreign citizens or subjects,' because one of the defendants is not a foreigner."

It is certainly true that the rule of strict construction must be applied to the acts of Congress defining the jurisdiction of courts, but it is possible to be too narrow and literal in construing these laws. See the opinion of the Supreme Court by Mr. Justice Gray in the case of Koenigsberger vs. Richmond Silver Mining Co., 158 U. S. 41-53. In that case the Supreme Court affirmed a decision of the United States Circuit Court for the District of South Dakota, maintaining its jurisdiction, on the ground of diverse citizenship, of a case which was pending in one of the Territorial Courts of Dakota Territory, at the time of the admission of South Dakota into the Union as a State. The Circuit Court of Appeals for the Ninth Circuit maintained the jurisdiction of this Court in a similar case, Blackburn vs. Wooding, 56 Fed. Rep. 545. All statutes, even those which impose penalties and declare forfeitures, must be given a sensible interpretation consonant with the intention and purpose of the legislature in enacting them. (United States vs. Kirby, 7 Wall. 482-487; Heydenfelt vs. Daney Gold and Silver Mining Co., 93 U. S. 634-641; United States vs. Stowell, 133 U. S. 1-20; Lan Ow Bew vs. United States, 147 U. S. 47-64.) The true rule applicable to this case was laid down by the Supreme Court in an opinion by Chief Justice Marshall, in the case of Strawbridge vs. Curtiss, 3 Cranch, 267, as follows: To bring a case in which there is more than one plaintiff or defendant, within the jurisdiction of a United States Circuit Court, on

the ground of diversity of citizenship of the parties, "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the Federal Court. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue or liable to be sued in those courts."

In Ex parte Girard, Fed. Cas. 5457, Mr. Justice Grier, in discussing the question in that case as to the right of removal, restated the rule enunciated by Marshall, and adapted it to removable causes in the following words: "Where there is more than one person, plaintiff or defendant, each must be competent to sue in the courts of the United States. The right to remove must exist in each and all the persons suing, and against whom the opposite party may demand a decree or judgment."

Within the letter and spirit of this rule, the right of the defendants to remove this cause into this court is clear.

The original petition for removal is criticised, because it did not allege that the alien defendant was a corporation organized and existing under the laws of the Dominion of Canada, at the time of the institution of this suit, but merely alleged that it was such corporation, and its citizenship was alleged to be that of a foreign corporation at the time of filing the petition. There was a hearing upon the petition by the Superior Court, and, upon leave granted by that Court, the petition was amended by inserting the necessary words to show that said defendant was an alien corporation at the time of the institution of the suit, to which amendment the plain-

tiff objected, and it is now contended that the amendment came too late, the time for filing a petition for removal having elapsed.

It is my opinion that the amendment was permissible, notwithstanding the plaintiff's objection thereto. If it had not been made before, and if it were deemed a necessary amendment, leave to make it would be granted by this Court now. My views on this subject are set forth in the case of Tremper vs. Schwabacher, 84 Fed. Rep. 415. See, also, 18 Enc. Pl. & Pr., 324, 325. But the amendment was unnecessary; the citizenship of a corporation is sufficiently disclosed by the allegation that it is a corporation duly organized under the laws of the State or country named. (Dodge vs. Tulleys, 144 U. S. 456.) The words of the petition refer to the creation of the corporation and determine its citizenship every moment of its existence, including the time of commencing this action against it. (Shaw vs. Quincy Mining Co., 145 U. S. 444-453.)

Motion to remand denied.

C. H. HANFORD,
Judge.

[Endorsed]: Opinion. Filed in the United States Circuit Court, District of Washington. November 1, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. 876.

Order Denying Motion to Remand.

Heretofore there came on duly and regularly for hearing the motion and application of the plaintiff to remand this cause to the Superior Court of the State of Washington, for the County of King, for the reasons set forth and contained in said motion, Messrs. Ballinger, Ronald & Battle appearing for the plaintiff, and John P. Hartman, Esq., appearing for the defendants, and after hearing the arguments of counsel and duly considering said motion, it is hereby ordered and adjudged that said motion be and the same is hereby in all things overruled and denied; to which order, judgment and decison of the Court plaintiff excepts, and his exception is hereby allowed.

Dated this 7th day of November, 1900.

C. H. HANFORD,
Judge.

X.

That the defendants deny each and every of the allegations contained in the tenth paragraph of said complaint.

Wherefore the said defendants pray that they may be dismissed hence, and recover their costs against the said plaintiff.

JOHN P. HARTMAN,
Attorney for Defendants.

State of Washington, }
County of King. } ss.

E. C. Hawkins, being first duly sworn, upon oath says; that he is the general manager of the above-named defendants; that he has read the foregoing answer and knows the contents thereof, and that the facts and allegations therein contained are true, as he verily believes.

E. C. HAWKINS.

Subscribed and sworn to before me this 20th day of November, 1900.

JOHN P. HARTMAN,
Notary Public in and for the State of Washington, Residing at Seattle.

We hereby acknowledge service of the foregoing, and the receipt of a true copy thereof this 21st day of November, 1900.

BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.

[Endorsed]: Answer. Filed in the United States Circuit Court, District of Washington. November 22, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,

Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,

Defendants.

No. 876.

Notice of Motion for New Trial.

To the Defendants Above Named, and Each of Them, and to John P. Hartman, Their Attorney:

Please take notice that the plaintiff in the above-entitled action intends to move the above-entitled court to set aside the verdict rendered in this cause in favor of the defendants and against the plaintiff on the 3d day of July, 1901, and for a new trial in the above-entitled action upon the following grounds:

I.

That said verdict is contrary to the law and to the evidence, and is without either law or evidence to support the same.

II.

Error in law occurring at the trial and excepted to at the time by the plaintiff.

And you will further take notice that said motion to be made is hereto attached, and is filed and served herewith.

Dated this 3d day of July, 1901.

J. D. JONES and
BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. 876.

Motion for New Trial.

Comes now the plaintiff in the above-entitled action and moves the above-entitled court to set aside the judgment rendered herein in favor of the defendants and against the plaintiff on the 3d day of July, 1901, and for a new trial in the above-entitled action for the following reasons:

I.

That said verdict is contrary to the law and to the evidence, and is without either law or evidence to support the same.

II.

Error in law occurring at the trial and excepted to at the time by the plaintiff.

J. D. JONES and
BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.

[Endorsed]: Notice of Motion for New Trial and Motion for New Trial. Filed in the United States Circuit Court, District of Washington. July 3, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY et al.,
Defendants.
No. 876.

Order Denying Motion for New Trial.

This cause coming on this day to be heard upon the plaintiff's motion for a new trial, the plaintiff being represented by his attorneys Ballinger, Ronald & Battle and J. D. Jones, and the defendants being represented

by their attorney, John P. Hartman, and the cause being argued by the respective counsel for the parties, and the Court taking the same into consideration:

It is ordered, considered, and adjudged that the plaintiff's motion for a new trial be, and the same hereby is, denied, to which ruling and order the said plaintiff excepts and an exception is allowed.

Done in open court this 29th day of October, 1901.

C. H. HANFORD,
Judge.

[Endorsed]: Order Denying Motion for New Trial. Filed in the United States Circuit Court, District of Washington. October 29, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.

No. 876.

Judgment.

This cause coming on this day to be heard upon the oral motion of the defendants for judgment against the

plaintiff, the said plaintiff being represented by his attorneys, Ballinger, Ronald & Battle and J. D. Jones, and the said defendants being represented by their attorney, John P. Hartman, the Court having heretofore denied the motion for a new trial, and the Court being fully advised in the premises, and no reason being given why judgment should not be entered against the said plaintiff and in favor of the said defendants;

It is therefore considered, adjudged and decreed by the Court that the said defendants be dismissed hence without day, and that they recover of and from the said plaintiff their costs, to be taxed by the clerk, and that execution shall issue for the recovery of the judgment award.

To the entry of this judgment and decree the said plaintiff excepts and an exception is allowed.

Done in open court this 30th day of October, 1901.

C. H. HANFORD,
Judge.

[Endorsed]: Judgment. Filed in the United States Circuit Court, District of Washington. October 30, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY et al.,
Defendants.
No. 876.

Stipulation for Extension of Time to File Bill of Exceptions.

It is hereby stipulated and agreed by and between the parties to this action that the time of the plaintiff within which to prepare and file and serve a bill of exception or exceptions in the above-entitled cause may be extended to and including the 23d day of November, 1901.

J. D. JONES and
BALLINGER, RONALD & BATTLE,
Attorneys for Plaintiff.
JOHN P. HARTMAN,
Attorney for Defendants.

[Endorsed]: Stipulation. Filed in the United States Circuit Court, District of Washington. November 9, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY et al.,
Defendants.
No. 876.

Order Extending Time to File Bill of Exceptions.

Now, on this 9th day of November, 1901, plaintiff appeared by his attorneys and moved the Court orally for an extension of time within which plaintiff may prepare, file and serve his bill of exception or exceptions herein, to and including the 23d day of November, 1901, and presented to the Court a stipulation of parties consenting to said extension

Wherefore, it is by the Court ordered and considered that the time within which plaintiff may prepare, file and serve his bill of exception or exceptions herein is enlarged and extended to and including the 23d day of November, 1901, said date being within the June, 1901, term of this court.

Done in open court this 9th day of November, 1901.

C. H. HANFORD,
Judge.

[Endorsed]: Order Extending Time. Filed in the United States Circuit Court, District of Washington. November 9, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.
No. 876.

Bill of Exceptions.

Be it remembered that this cause came on duly and regularly for trial on the 25th day of June, 1901, before Honorable C. H. Hanford, Judge of the above-entitled court, plaintiff appearing by his attorneys, Ballinger, Ronald & Battle and J. D. Jones, and the defendants appearing by their attorney, John P. Hartman. A jury being impaneled and sworn to try the case, the following proceedings were had and the following exceptions duly taken:

Exception I.

To sustain the issues on behalf of the plaintiff, G. W. ROBERTS the plaintiff was called and gave testimony, as did other witnesses, tending to show that L. H. Gray was at all the times mentioned in plaintiff's complaint, and hereinafter mentioned, the general traffic manager of both of the defendant companies, and had and maintained his office as such traffic manager in the city of

Seattle, Washington, that prior to the writing of the letters hereinafter set forth, said Roberts visited said traffic manager at his office in said city of Seattle concerning the making of contract with the said defendants for the hauling of freight; that when he, plaintiff, went into the office of the defendant companies at Seattle, Washington, to talk with the said L. H. Gray, General Traffic Manager, about hauling freight from the summit of White Pass to Lake Bennett, said Gray informed him that the defendant companies were going to have a great quantity of freight to be carried over, and that the freighters and packers up there were asking ten cents a pound to haul freight from the summit of White Pass to Lake Bennett, and was there told by the said Gray that he, plaintiff, was just the man said Gray wanted to talk with, and after learning that plaintiff was acquainted with that country, desired to know if plaintiff wanted a contract to haul freight up there, to which plaintiff replied that he did; whereupon said Gray asked plaintiff what the same could be hauled for, and further informed plaintiff in said conversation that the Dyea Tramway Company was hauling freight to Lake Bennett for seven (7) cents a pound, and wanted to know if plaintiff would take a contract to haul freight at such a rate from said summit to Lake Bennett as would enable the defendants to compete with said Dyea Tramway Company, whereupon the plaintiff asked said Gray what the defendant companies charged for transporting freight from Skagway to said summit, to which the said Gray replied, two cents a pound; and further stated to plaintiff that if he, plaintiff, could transport it from said summit to Bennett

at a figure by which the defendants could compete with said Dyea Company, the said defendants would give plaintiff a contract to haul freight, whereupon plaintiff stated that he, plaintiff, would haul said freight from the said summit of White Pass to said Lake Bennett for four and one-half cents a pound; thereupon said Gray asked plaintiff if he would put said proposition in writing, to which plaintiff replied in the affirmative, whereupon said Gray stated to plaintiff: "Well, you do that, and make me this proposition in writing." Further in said conversation said Gray asked the plaintiff if he, plaintiff, had teams up there (meaning at said summit) all ready to haul freight, and was informed by plaintiff that he did not at said time, but that he, plaintiff, could and would procure an outfit of teams sufficient to handle any amount of freight that said defendants might give plaintiff to haul; that said Gray also then and there stated to plaintiff that the defendants would have thousands of tons to haul from the summit to Lake Bennett, and that the defendants did not wish to be bothered about the scarcity of teams, and insisted on the said plaintiff procuring his outfit and being ready to receive and haul said goods and freight by a date then and there designated by the said Gray; that thereupon plaintiff, in compliance with the request of said Gray, embodied said proposition in writing, which said writing was introduced in evidence and marked Plaintiff's Exhibit "A," and is as follows:

Plaintiff's Exhibit "A."

Seattle, Wash., Dec. 14, 1898.

Pacific & Arctic Railway and Navigation Co., British Columbia-Yukon Railway Co., Dexter Horton Bldg., Seattle, Wash.

Gentlemen: In keeping with my conversation of yesterday with your general traffic manager, Mr. L. H. Gray, in reference to freighting goods for you from the White Pass, or summit of the mountain, to Lake Bennett in the Northwest Territory, I wish to say that if you will guarantee to furnish me at least one hundred tons per month commencing Jan. 15, 1899, and extending to about April 15, 1899, or until the roads break up in the spring, and pay me therefor at the rate of four and one-half cents per pound on delivery of goods at Lake Bennett, and haul my feed and supplies from Skagway to the summit of the mountains for one and one-half cents per pound, and give me a free pass over your road during the time of said work, I will agree to put on sufficient teams to handle, with expedition, the amount above stated or more, when we find that there will be more for me to haul, you, of course, giving me sufficient notice to procure the extra teams, and will endeavor to work to your interest in the handling of said freight and protect you from any combination that might be formed for the purpose of advancing rates; any piece of machinery or other freight weighing more than five hundred pounds, to be paid for

extra, as may be agreed upon hereafter. An early reply will greatly oblige,

Yours truly,

G. W. ROBERTS,

Room 622, New York Block, Seattle.

Which proposition or letter the said Gray duly received, and in reply thereto the said Gray, as such general traffic manager, delivered to plaintiff a certain paper writing offered in evidence and marked Plaintiff's Exhibit "B," which is as follows:

Plaintiff's Exhibit "B."

Seattle, Wash., December 16th, 1898.

File No. 74, G. W. Roberts, shipments.

Mr. G. W. Roberts, Room No. 622 N. Y. Bldg., City.

Dear Sir: Referring to your favor of December 14th, 1898, my file No. 74, will say that we expect to haul from Skaguay to the summit of White Pass about 4,000 tons of freight, between January 15th and April 15th. We accept your rate of 4½ cts. per lb. from Summit of White Pass (International Boundary) to Lake Bennett, but we cannot agree to give you any special amount in a specified time, as the elements are beyond our control, and there is a possibility of the steamers being delayed in reaching Skaguay. We do agree however to treat you fairly by dividing the freight with you and other parties in proportion to their carrying capacity. You can depend upon the White Pass & Yukon Route acting fairly and squarely with you; and, it is my opinion that you will be offered at least 25 or 30 tons of freight per day.

We will agree to allow your sleds and harness repaired and horses shod at our blacksmith shops along the trail, at actual cost.

I consider the above a fair proposition and await your acceptance.

Yours truly,

L. H. GRAY,
G. T. M.

LHG—M.

Thereafter, and on the same day, plaintiff, in reply thereto, delivered to the said Gray, as such traffic manager, certain other paper writing admitted in evidence and marked Plaintiff's Exhibit "C," which is as follows:

Plaintiff's Exhibit "C."

Seattle, Wash., Dec. 17th, 1898.

White Pass & Yukon Route, L. H. Gray, G. T. M., Seattle, Wash.

Dear Sir: Referring to your favor of Dec. 16th in reference to carrying your freight from the summit of White Pass to Lake Bennett, I have considered your proposal to give me a rate of 4-½ cts. per lb. and hereby accept the same.

Very truly yours,

G. W. ROBERTS.

And further to sustain the allegations of plaintiff's complaint, plaintiff and other witnesses gave testimony tending to prove that plaintiff, in order to comply with and in reliance upon the propositions and answers and acceptances marked "A," "B," and "C" and above copied, equipped himself with horses, sleds, harness, feed, and

outfit for the purpose of taking the same to the summit of White Pass, Alaska, for the purpose of using the same in the fulfillment and carrying out the contract of hauling said freight from the summit of White Pass to Lake Bennett, and that said equipment was completed and taken by the said Roberts to the said point in Alaska within the time required by said paper writings, and upon his arrival at Skagway with the same, notified and informed the said Gray, who then was at said Skagway, that the plaintiff was in readiness with his horses, harness, sleds, outfit, etc., to haul freight from the summit to Lake Bennett, as per the terms of said paper writings, and demanded that freight be delivered by said defendants to the plaintiff to be hauled as aforesaid, as per the terms of said paper writings. And against the evidence in behalf of the plaintiff the defendants introduced and the Court admitted evidence tending to prove the contrary.

It was further stipulated upon the trial of this action that at least 2,200 tons of commercial freight was transported from Skagway to said summit to be thence transported or hauled by sled, teams, etc., from the summit to Lake Bennett. And it was further shown in the testimony that the said defendants did not furnish nor deliver to this plaintiff any freight whatsoever, and that plaintiff was not permitted to haul any of said freight, although demand was made therefor by plaintiff.

Further, plaintiff having rested his case, the defendant called to testify as a witness on behalf of defendants the said L. H. GRAY, who, over the objection of plaintiff on the ground that the same was irrelevant, immaterial and

incompetent, and had the effect of tending to prove the rescission or modification of the contract as claimed by plaintiff without the same having been pleaded by the defendant, gave testimony in substance as follows:

After Mr. Roberts arrived in Alaska with his teams, outfit, etc., I notified him personally that we could not give him any freight on account of the high rates he wanted from the summit to Lake Bennett, and I notified him and the other packers that it would be necessary to reduce our rates still lower from the summit to Lake Bennett; whereupon the plaintiff Roberts stated to me that he could not carry freight for almost nothing, and that he did not want freight at the reduced rates which I told him the freight must be hauled for in order that we could compete with the Dyea trail; that after the said Roberts arrived in Alaska with his horses, teams, outfit, etc., that he, the plaintiff Roberts, signed a document received in evidence and marked Defendants' Exhibit No. 2, which is as follows:

Defendants' Exhibit No. 2.

Skaguay, Alaska, February 15th, 1899.

Mr. L. H. Gray, G. T. M., W. P. & Y. R., Seattle, Washington.

Dear Sir: We, the undersigned, hereby agree to protect the following freighters' rates during good sledding:

Between Heney and Summit .....1c. per pound.
Between Summit and Log Cabin .....1c. per pound.
Between Summit and Lake Bennett ..2c. per pound.
Between Log Cabin and Lake Bennett .1c. per pound.

If absolutely necessary to protect Dyea competition and Packers' rates from Skaguay, we will confer with you and arrange some satisfactory basis of rates.

Yours truly,

G. W. ROBERTS.

And that thereafter the said Gray notified plaintiff that he must make a still lower cut in the freight rate from the summit to Lake Bennett, and that the plaintiff stated that he did not want freight upon those rates, to the admission of all of which said testimony and of said paper writing marked Defendants' Exhibit No. 2, the plaintiff then and there in writing duly excepted, which exception was allowed by the Court.

Exception II.

After this case was set for trial for June 25, 1901, defendants made application to the Court for a continuance thereof, on the ground that one A. J. Powell was a material witness on behalf of the defense and it was impossible to procure the attendance of the said A. J. Powell to testify on said trial on said June 25th, which said applicaton for continuance was supported by an affidavit of John P. Hartman, the defendants' attorney, to the effect that the said A. J. Powell, if personally present at said trial, would testify that the plaintiff did not at the time of making the alleged contract as set forth in plaintiff's complaint, or at any time thereafter, have any pack horses or other animals at Skagway, Alaska, or elsewhere that he could use for the purpose of packing, drawing or hauling goods, wares or mer-

chandise as alleged by plaintiff in his complaint; that the plaintiff was not at that time or thereafter possessed of any facilities, appliances, teams, machinery or otherwise, for packing, drawing or hauling goods from White Pass to Bennett, or anywhere else, and that the plaintiff was without funds or credit of any kind or character whatsoever with which to procure teams, horses, or appliances for the purpose of transporting goods as alleged he would have done, as set forth by plaintiff in his complaint; and that the relations existing between plaintiff and said Powell were intimate and close, and that said Powell was fully acquainted with the financial condition of plaintiff, and was during all the time between January 1, 1899, and for the four months following thereafter, in almost daily contact with plaintiff, and knew his condition and ability to respond on any contract which he might make. That upon the hearing of said application the Court decided that said motion of defendants for continuance would be granted upon terms unless plaintiff should agree and admit that if the said Powell were present he would testify as set forth in said affidavit; whereupon, and for the purpose of avoiding a continuance, plaintiff admitted that if the said Powell were present and testifying in this cause, he would testify as set forth in said affidavit. Further, as a part of the evidence for the defense, said admission was introduced in evidence by the defendants.

In rebuttal, and for the purpose of showing that said Powell had at another time made a contrary state

ment, plaintiff called the witness R. M. HESTER, whereupon the following questions were propounded by counsel for plaintiff to said witness:

Q. You are acquainted with one A. J. Powell?

A. I am.

Q. State whether or not Mr. Powell ever made any statement to you as to any horses being taken up to Alaska by him or Mr. Roberts for the purpose of carrying out the contract claimed by Mr. Roberts to have then existed between him and the defendant companies in this case, for the transportation of freight from the summit to Lake Bennett.

To which question counsel for defendants interposed the following objections:

"I object, for the reason that any statements of this witness unless made in our presence, would be improper and not rebuttal testimony."

Which objection the Court thereupon sustained, to the sustaining of which plaintiff then and there in writing duly excepted, which exception was allowed by the Court.

And upon the trial, after all the evidence had been introduced and counsel for both parties had concluded their arguments and submitted the case, the Court instructed the jury as to the law and among other instructions gave the following:

"If you find from a preponderance of the evidence that a contract was made and entered into as claimed by plaintiff, and that plaintiff, either in person or through anyone else, procured the necessary teams, harness,

sleds, etc., for the purpose of fulfilling said contract, and placed himself in readiness to perform the same and intended performance thereof, then and in that event you are instructed that this constituted a complete contract and that the defendants under the issues of this case cannot claim, and you cannot consider, any modification, if any, of said contract."

And after the jury had retired, Mr. Hartman, attorney for the defendants, informed the Court that he wished to take an exception to said instruction, and thereupon instead of allowing the exception the Court recalled the jury and gave additional instructions as follows:

"Gentlemen of the jury, it has been supposed that one of our instructions may have been misleading. That was the instruction I gave you that if the jury find that a contract was made that you are not required to consider at all the question of any subsequent modification or change in the terms of the contract. Now, I have no intention to withdraw that instruction. I leave it as I gave it to you, but, lest there should be any misapprehension in your mind I want to tell you that I had no intention of instructing you under any circumstances to disregard the exhibit introduced in the case, a writing signed by Mr. Roberts, signed at Skagway, with reference to the rate of hauling freight. I leave that as a scrap of evidence in the case which you should consider along with all the other testimony in the case, as bearing on the whole question of whether there was a contract made and entered into with definite terms. My instruction that you are not to consider any modifi-

cation of the agreement, if any was ever made and consummated, does not carry with it as a consequence that you are to reject that as evidence."

Now, in furtherance of justice and that right may be done, plaintiff presents the foregoing as his bill of exceptions in this case, and prays that the same may be settled and allowed, signed and certified by the judge, as provided by law.

BALLINGER, RONALD & BATTLE, and
J. D. JONES,
Attorneys for Plaintiff.

The foregoing bill of exceptions is correct and is hereby approved, allowed and settled and made a part of the record herein.

Done in open court at the June term, 1901, and dated this 2d day of December, 1901.

C. H. HANFORD,
Judge.

Copy of within bill of exceptions received, and due service thereof acknowledged this 21st day of November, 1901.

JOHN P. HARTMAN,
Attorney for Defendants.

[Endorsed]: Bill of Exceptions. Filed in the United States Circuit Court, District of Washington. November 21, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

Settled and refiled in the United States Circuit Court, District of Washington, December 2, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. 876.

Petition for Order Allowing Writ of Error.

The plaintiff herein, G. W. Roberts, feeling himself aggrieved by the verdict of the jury and the judgment rendered on the 30th day of October, 1901, pursuant to said verdict, whereby it was considered and adjudged that the defendants be dismissed hence without delay, and that they recover of and from said plaintiff their costs to be taxed by the clerk, and that execution shall issue for the recovery of the judgment award, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of said plaintiff, all of which will more in detail appear from the assignment of errors, which is filed with this petition and in the bill of exceptions filed in this cause, comes now by Ballinger, Ronald & Battle and J. D. Jones,

his attorneys, and pray said Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and the transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the United States Circuit Court of Appeals. And your petitioner will ever pray.

Dated this 18th day of April, 1902.

BALLLINGER, RONALD & BATTLE, and
J. D. JONES,

Attorneys for Plaintiff.

Copy of the foregoing petition received and due service thereof acknowledged this 18th day of April, 1902.

JOHN P. HARTMAN,
Attorney for Defendants.

[Endorsed]: Petition for Order Allowing Writ of Error. Filed in the United States Circuit Court, District of Washington. April 18, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff in Error,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.
No. 876.

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the courtroom of said court in the city of Spokane, on the petition of the plaintiff G. W. Roberts, praying for the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed within due time;

And also praying that a transcript of the record and proceedings and papers upon which a judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises:

Now, therefore, it is ordered that the appeal bond herein be and the same is hereby fixed at the sum of two hundred and fifty dollars, conditioned and to the effect

that the said plaintiff, shall prosecute his writ of error to effect and shall answer all damages and costs that may be awarded against him if he fail to make his plea and appeal good. Said bond and security to be approved by the above-entitled Court or Judge presiding therein.

Done in open court this 17th day of April, A. D. 1902.

C. H. HANFORD,

District Judge, and one of the Judges of the said United States Circuit Court Presiding Therein.

[Endorsed]: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the United States Circuit Court, District of Washington, April 18, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. 876.

Assignment of Errors.

Comes now the above-named plaintiff, G. W. Roberts, by Ballinger, Ronald & Battle and J. D. Jones, his at-

torneys, and in connection with their petition for writ of error herein, make the following assignment of errors, and particularly specify the following errors upon which he will rely, and which he will urge upon the prosecution of said writ of error in the above-entitled cause, and which he avers occurred on the trial of the cause, to wit:

I.

That the United States Circuit Court, in and for the District of Washington, Northern Division, erred in overruling the motion filed in this cause in this court by plaintiff to remand this case to the Superior Court of King County, Washington, in which said cause was instituted, and in making, rendering, and entering the judgment herein overruling and denying said motion.

II.

The Court further erred in admitting, over the objection of the plaintiff, the testimony of L. H. Gray, a witness for the defendants, the full substance of which testimony is as follows:

That after the plaintiff arrived in Alaska with his horses, sleds, outfit, etc., I, L. H. Gray, notified him personally that we (meaning the defendant companies) could not give him any freight on account of the high rates he wanted for hauling the same from the summit of White Pass to Lake Bennett, and I notified him, the plaintiff, and the other packers that it would be necessary to reduce our rates still lower from the summit to Lake Bennett; whereupon the plaintiff stated to me that he could not carry freight for almost nothing, and that he did not want freight at the reduced rates which I told

him the freight must be hauled for in order that we could compete with the Dyea trail.

And in receiving in evidence Defendant's Exhibit No. 2 referred to and set forth in the bill of exceptions; and in permitting said witness to testify that he notified plaintiff that he must make still lower cut in the freight rates from the summit to Lake Bennett, and that plaintiff then stated that he did not want freight upon those rates.

III.

Error of the Court in sustaining the objections of the defendants to the following questions propounded by the attorney for the plaintiff to the witness R. M. Hester:

Q. Are you acquainted with one A. J. Powell?

A. I am.

Q. State whether or not Mr. Powell ever made any statement to you as to any horses being taken up to Alaska by him or Mr. Roberts for the purpose of carrying out the contract claimed by Mr. Roberts to have then existed between himself and the defendant companies in this case, for the transportation of freight from the summit to Lake Bennett?

To which questions counsel for defendants interposed the following objections:

"I object, for the reason that any statements of this witness, unless made in our presence, would be improper and not rebuttal testimony." Which objection the lower court sustained.

BALLINGER, RONALD & BATTLE, and
J. D. JONES,
Attorneys for Plaintiff.

Copy of the foregoing assignment of errors received and due service thereof acknowledged this 18th day of April, 1902.

JOHN P. HARTMAN,
Attorney for Defendants.

[Endorsed]: Assignment of Errors. Filed in the United States Circuit Court, District of Washington, April 18, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff in Error,
vs.
PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.
No. 876.

Bond on Writ of Error.

Know all men by these presents, that G. W. Roberts, plaintiff in the above-entitled action, as principal, and J. W. Foust and C. D. Patterson, as sureties, are held and firmly bound unto the Pacific & Arctic Railway and Navigation Company, and British Columbia-Yukon Railway

Company, and each of them, in the full and just sum of two hundred and fifty and no|100 dollars, to be paid to the said defendants, their attorneys, successors or assigns, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors, or assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 24th day of April, 1902.

The condition of the above obligation is such that whereas, lately at a session of the United States Circuit Court of the United States, for the District of Washington, Northern Division, in a suit pending in said court between the said G. W. Roberts as plaintiff, and the Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company, corporations, as defendants, final judgment was rendered against said plaintiff adjudging that defendants be dismissed hence without delay, and that they recover of and from plaintiff their costs to be taxed by the clerk, and that execution issue for the recovery of the judgment award; and

Whereas, said plaintiff has obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants in the aforesaid suit is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California:

Now, therefore, if the said G. W. Roberts shall prosecute his writ of error to effect, and shall answer all damages and costs that may be awarded against him if he

fails to make his plea good, then this obligation is to be void; otherwise to remain in full force and effect.

G. W. ROBERTS,
Principal.

J. N. FOUST,
C. D. PATTERSON,
Sureties.

Signed, sealed and delivered in the presence of:

A. J. TENNANT.
D. I. WASHBURN.

United States of America,
District of Washington. } ss.

J. N. Foust and C. D. Patterson, being first duly sworn, on oath each for himself deposes and says that he is one of the sureties named in the foregoing bond; that he is worth the sum of five hundred ($500) dollars over and above all his just debts and liabilities, and property exempt from execution, situated in the State of Washington. That he is neither an attorney nor counselor at law, sheriff, or clerk of the Superior or other court.

J. N. FOUST.
C. D. PATTERSON.

Subscribed and sworn to before me this 24th day of April, 1902.

[Notarial Seal] A. J. TENNANT,
Notary Public in and for the State of Washington, Residing at Seattle.

Approved this 25th day of April, 1902.

C. H. HANFORD,
Judge.

[Endorsed]: Bond on Writ of Error. Filed in the United States Circuit Court, District of Washington, April 26, 1902. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the United States Circuit Court, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. 876.

Acceptance of Service of Writ of Error.

I, the undersigned, attorney for defendants in error above named, hereby admit having received and served with a copy of the writ of error in this cause, this 28th day of April, 1902.

JOHN P. HARTMAN,
Attorney for Pacific & Arctic Railway and Navigation Company, and British Columbia-Yukon Railway Company.

[Endorsed]: Acceptance of Service of Writ of Error. Filed in the United States Circuit Court, District of Washington, May 3, 1902. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

G. W. ROBERTS,
Plaintiff,
(Plaintiff in Error),

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants.
(Defendants in Error).

No. 876.

Clerk's Certificate to Transcript.

United States of America,
District of Washington. } ss.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States, for the District of Washington, do hereby certify the foregoing forty-eight (48) typewritten pages, numbered from one to forty-eight, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of

record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is the sum of $14.75, and that the same has been paid to me by Ballinger, Ronald & Battle, attorneys for plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court this 15th day of May, 1902.

[Seal] A. REEVES AYRES,

Clerk United States Circuit Court, District of Washington.

By R. M. Hopkins,

Deputy Clerk of said Court.

In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. —.

Writ of Error.

United States of America, } ss.
Ninth Circuit.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States, for the District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between G. W. Roberts, plaintiff and plaintiff in error, and Pacific & Arctic Railway and Navigation Company, a corporation, and British Columbia-Yukon Railway Company, a corporation, defendants and defendants in error, a manifest error hath happened to the great damage of the said G. W. Roberts, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you may have the same at the city of San Francisco, State of California, within thirty days from the date of this writ, to wit, on the 24th day of May, 1902, to be then and there held, that the record and proceedings aforesaid be inspected that the said Circuit Court of Appeals may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 24th day of April, 1902, and of the Independence of the United States the one hundred and twenty-sixth.

[Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court, for the Ninth Circuit, District of Washington.

By H. M. Walthew,
Deputy Clerk.

The foregoing writ of error is hereby allowed this 25th day of April, 1902.

C. H. HANFORD,
United States District Judge Presiding in said Circuit Court.

United States of America,
District of Washington, } ss.
Northern Division.

The foregoing original writ of error is hereby admitted to have this day been lodged with me in my office in the courthouse of the United States Circuit Court, for the District of Washington, Northern Division, and at said time and place filed by me, said office being the office in which the record in said foregoing case then was, and wherein it now remains, and at the same time and place there was lodged with me and filed two copies of this writ, one for each of the adverse parties, the defendants in error herein.

Witness my hand and the seal of said Court this 26th day of April, 1902.

[Seal] A. REEVES AYRES,
Clerk.

By H. M. Walthew,
Deputy Clerk.

[Endorsed]: Original. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. G. W. Roberts, Plaintiff in Error, vs. Pacific & Arctic Railway and Navigation Company, et al., Defendants in Error. Writ of Error. Filed in the United States Circuit Court, District of Washington, April 26th, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit.

G. W. ROBERTS,
Plaintiff in Error,

vs.

PACIFIC & ARCTIC RAILWAY AND NAVIGATION COMPANY and BRITISH COLUMBIA-YUKON RAILWAY COMPANY,
Defendants in Error.

No. —.

Citation.

The President of the United States of America, to the Pacific & Arctic Railway and Navigation Company, and British Columbia-Yukon Railway Company, the Above-named Defendants in Error, and Each of Them, Greeting:

You are hereby cited and admonished to appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, for the District of Washington, Northern Division, in that certain action wherein G. W. Roberts is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said

writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 25th day of April, 1902.

[Seal] C. H. HANFORD,
United States District Judge, Sitting as United States Circuit Judge, Ninth Circuit, District of Washington.

Service of the foregoing citation and receipt of copy thereof admitted this 28th day of April, 1902.

JOHN P. HARTMAN,
Attorney for Defendants in Error.

[Endorsed]: Original. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. G. W. Roberts, Plaintiff in Error, vs. Pacific & Arctic Railway and Navigation Company, et al., Defendants in Error. Citation. Filed in the United States Circuit Court, District of Washington, April 28th, 1902. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

[Endorsed]: No. 840. In the United States Circuit Court of Appeals, for the Ninth Circuit. G. W. Roberts, Plaintiff in Error, vs. Pacific & Arctic Railway and Navigation Company and British Columbia-Yukon Railway Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Washington, Northern Division.

Recorded May 19, 1902, and filed May 20, 1902.

F. D. MONCKTON,
Clerk.